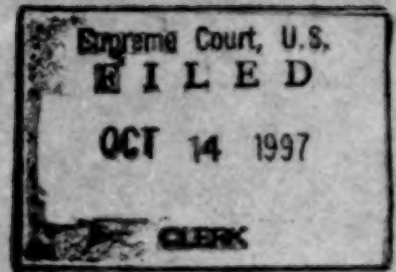


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No. 96-1577

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF ALASKA,
Petitioner,

v.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT,
et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICUS CURIAE*
KONIAG, INC.,
IN SUPPORT OF RESPONDENTS
NATIVE VILLAGE OF
VENETIE TRIBAL GOVERNMENT, *ET AL.*

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INTEREST OF THE *AMICUS CURIAE*

Koniag, Inc. (hereinafter Koniag)¹ is a regional corporation formed pursuant to the Alaska Native Claims

¹ This brief is filed with the consent of the parties and their letters of consent have been lodged with the Clerk of this Court.

Settlement Act (hereafter ANCSA).² All its directors are Alaska Natives and the vast majority of its shareholders are also Alaska Natives. About half of its shareholders are also shareholders of village corporations within the geographical boundaries of its region, and about half of its shareholders are not. Koniag has a direct and substantial interest in matters affecting Alaska Natives generally and ANCSA specifically as its existence and its obligations to its shareholders are derived from that Act. Koniag brings to this controversy the unique perspective of an Alaska Native Regional Corporation. It urges this Court to affirm the result reached by the Ninth Circuit that the Venetie lands in accordance with the universal wishes of its tribal members be accorded the status of Indian Country. Koniag's central interest as amicus, however, is to urge that the Ninth Circuit's unnecessarily expansive holding be limited to the peculiar facts presented in Venetie because to do otherwise will, as Judge Fernandez admonishes, open "a blizzard of litigation." That litigation in Koniag's view will not be with the State of Alaska, but instead will be between Alaska Natives, possibly pitting Koniag itself against villages within its constituent region, and possibly pitting its Alaska Native shareholders one against another. To understand why this is so, especially for a regional corporation, Koniag explains first its role within ANCSA.

INTRODUCTION

In passing ANCSA, Congress settled upon a complex formula intended to satisfy a variety of goals. Settlement, said Congress, should be accomplished "in conformity with the real economic and social needs of Natives, without litigation ... without establishing any permanent racially defined institutions, rights, privileges or obligations, without creating a reservation system or lengthy wardship or trusteeship"³ To effect these

² 43 U.S.C. § 1606(d).

³ 43 U.S.C. § 1601(b).

goals, Congress created two overlapping private corporate entities to receive the land and money provided Alaska Natives under the Act.⁴ These entities included regional corporations, such as Koniag, and village corporations, like *Amicus Shee Atika, Inc.*⁵

In effecting settlement of Alaska Native land claims, Congress sought to insure that all living Alaska Natives benefited from the settlement.⁶ Neither residency in a particular community nor choice of lifestyle was to play a role in the selection of those entitled to the settlement. Although regional corporations serve a variety of critical functions under ANCSA, perhaps their most important role is to serve as the vehicle for ANCSA's goals of disbursing settlement money, equitably allocating income from resource development, and managing lands for all Alaska Natives.

Dividing the state into twelve regions composed, "as far as practicable, of Natives having a common heritage and sharing common interests," ANCSA provided for a corporation for each one of these regions.⁷ ANCSA also provided for an optional thirteenth regional corporation for Alaska Natives who did not reside in Alaska.⁸ To determine enrollment in the regional corporations, ANCSA required that the Secretary of the Interior create a roll of all Natives "born on or before, and

⁴ 43 U.S.C. §§ 1606, 1607.

⁵ *Shee Atika, Inc.* is actually an urban corporation (43 U.S.C. § 1613(h)(3)) which does not functionally differ from village corporations for the purposes of this section.

⁶ 43 U.S.C. § 1604(a).

⁷ 43 U.S.C. § 1606(a).

⁸ 43 U.S.C. § 1606(c). Indeed a thirteenth regional corporation was formed. Since it shares only in the monetary and not land entitlements under ANCSA, only the twelve Alaska regional corporations are considered in this brief.

who are living on, December 18, 1971."⁹ Individual Alaska Natives were then given the opportunity to enroll to the various regional corporations based on their current place of residence.¹⁰ If, at the time of the roll, an Alaska Native was not a permanent resident within the area encompassed by one of the twelve corporations he or she would be allocated to one of the corporations based on a list of prioritized factors.¹¹ This scheme insured that all living Alaska Natives were enrolled in one of the regional corporations.¹²

Under its two tier system, ANCSA also provided for the formation of village corporations.¹³ ANCSA provided a list of over 200 such villages and criteria by which the villages could be added or removed from the list by the Secretary of the Interior.¹⁴ Unlike regional

⁹ 43 U.S.C. § 1604(a).

¹⁰ 43 U.S.C. § 1604(b).

¹¹ *Id.*

¹² Although ANCSA places restrictions on a shareholder's rights of alienation, under the initial statute shares were freely inheritable without consideration for the nativeness of the beneficiary. 43 U.S.C. § 1606(h) (amended 1980 & 1991). Accordingly, just as Congress anticipated non-resident shareholders, it also anticipated a limited number of non-native shareholders.

¹³ 43 U.S.C. 1607(a). Although distinct entities, a regional corporation and village corporations within its region are closely intertwined in a variety of ways. See generally, Monroe E. Price, *Region-Village Relations Under the Alaska Native Claims Settlement Act*, 5 Alaska L. Rev. 58 (1975) (Price I); and Monroe E. Price, *Region-Village Relations Under the Alaska Native Claims Settlement Act - Part II*, 5 Alaska L. Rev. 237 (1976) (Price II).

¹⁴ 43 U.S.C. § 1610. *Koniag, Inc., Village of Nyak v. Andrus*, 580 F.2d 601, 606 (D.C. Cir.), cert. denied, 439 U.S. 1052 (1978).

corporations, not all Alaska Natives were enrolled in a village corporation.¹⁵ If, at the time of the 1970 census, an Alaska Native was not a resident, as defined,¹⁶ of a particular village, that person would receive enrollment to a regional corporation only.¹⁷ Accordingly, although all village corporation shareholders were also regional corporation shareholders, not all regional shareholders were also village corporation shareholders. Nevertheless, for reasons addressed at length in the brief of *Amicus Shee Atika*, village corporations and Alaska Native Villages had divergent memberships even from the date of ANCSA's passage.¹⁸

¹⁵ 43 U.S.C. § 1604(b).

¹⁶ The regulations implementing ANCSA defined permanent residence as "the place of domicile on April 1, 1970, which is the location of the permanent place of abode intended by the applicant to be his actual home A region or village may be the permanent residence of an applicant on April 1, 1970, even though he was not actually living there on that date, if he has continued to intend that place to be his home." 25 C.F.R. § 43h.1(k) (1972) (removed, 53 Fed. Reg. 21995 (1988)). Because actual physical residence was not required by these regulations, from the outset village corporate enrollment included Alaska Natives who did not dwell in the village itself.

¹⁷ See 43 U.S.C. § 1604(b).

¹⁸ See Br. of *Amicus Shee Atika* at 6-11. Unlike the regional corporations in which shareholder status was determined by statute, voting membership in the village governments is determined by the village itself. Felix S. Cohen, *Handbook of Federal Indian Law* 248 (1982 ed.). Village governments are free to restrict voting membership only to those persons actually physically residing within the village. See Br. of *Amicus Shee Atika*, Appendix at 14a (limiting new membership to those persons "who set[] up a permanent home in the vicinity of the Tribe"). Village membership, therefore, is in constant flux as Alaska Natives move to and from the village and as residents reach the age of majority or die. By contrast, these demographic factors do not affect ANCSA shareholder status to the same degree. For example,

One can see these patterns of divergent membership in the history of Koniag itself. The Koniag region encompasses approximately 7,300 square miles and includes within its borders the Kodiak Island group and a portion of the upper Alaska Peninsula. Shortly after ANCSA's passage, Koniag had 3,340 shareholders, 1,958 of whom resided within the region.¹⁹ Thus, 1,382 or 41% of Koniag's shareholders were at-large shareholders who neither held stock in a village corporation nor physically resided in a village.

Like all ANCSA regional corporations, Koniag is incorporated under the laws of Alaska to conduct business for profit.²⁰ By requiring that Koniag and the other regional corporations incorporate on a for-profit basis, Congress assured that all regional corporation shareholders received the democratic protections provided under statutory and corporate common law.²¹ Koniag and its fellow corporations all bear a substantial

a person born after ANCSA's enrollment date, regardless of their nativeness or their residency in a particular village or region has no automatic entitlement to shareholder status in either a regional or village corporation. Accordingly, ANCSA's structure assured not only that village residency and shareholder status would be divergent at the outset, but that this divergence would necessarily increase over time.

¹⁹ Robert D. Arnold, *Alaska Native Land Claims* 166 (1978).

²⁰ 43 U.S.C. § 1606(d). Although also required to incorporate under the laws of the state of Alaska, the village corporations were given the option of incorporating either as a for-profit or non-profit corporation. 43 U.S.C. § 1607(a). Despite this choice, all of the village corporations opted to organize on a for-profit basis. Arnold, *supra*, at 198.

²¹ See generally Douglas M. Branson, *Square Pegs in Round Holes: Alaska Native Claims Settlement Corporations Under Corporate Law*, 8 Alaska L. Rev. 103, 119 (1979) (arguing that regional corporations must act with extreme care in pursuing policies that appear to benefit one village within the region).

obligation to insure that the interests of each one of its shareholders is equally benefited by the profits of the corporation.

In disbursing land under ANCSA, Congress was faced with a particularly difficult task. Congress had to balance the need to protect traditional Alaska Native use of the land with its desire to provide the benefits of settlement to all Alaska Natives. One way in which Congress resolved this problem, was, with a few exceptions, to provide for dual ownership between regional and village corporations over the land selected by village corporations. Under this scheme, village corporations obtained the surface rights to village corporation selections, while the regional corporations generally obtained the subsurface rights.²² ANCSA provided only one situation in which a village corporation might unilaterally obtain both the surface and subsurface rights to ANCSA lands.²³ ANCSA provided that a "Village Corporation or corporations may elect within two years to acquire title to the surface and subsurface estates in any reserve set aside for the use or benefit of its stockholders or members prior to December 18, 1971."²⁴ It is this provision that provided the Appellee's, the Village of Venetie (hereinafter Venetie), with the land they now seek to treat as Indian Country.

²² 43 U.S.C. § 1613(a),(e). ANCSA provided an exception to this rule for situations in which the village corporation selection included land within a national wildlife refuge. In such cases, the subsurface estate was retained by the federal government. 43 U.S.C. § 1611(a)(1).

²³ In certain circumstances, regional corporations were entitled to select land independently of the village corporations. In such cases, the regional corporation generally obtained both the surface and subsurface estate. 43 U.S.C. § 1611(c).

²⁴ 43 U.S.C. § 1618(b).

Except for those village corporations selecting former reservation land, ANCSA permitted village corporations to select land based on the number of residents enrolled to the village.²⁵ As a means of honoring traditional village interests, village corporations were required to select lands enclosing the village and were permitted to select additional lands from surrounding townships.²⁶ At the same time, village corporation selections often reflected a combination of traditional and economic motivations. For instance, village corporations were limited in their ability to select lands within national wildlife refuges.²⁷ Additionally, all selections were subject to prior existing rights.²⁸ Consequently, in many instances, the village corporation's land entitlement could not be satisfied with lands adjacent to the villages. Thus, the selection process resulted in village corporations selecting lands, in some cases, several hundred miles from the village itself.²⁹ These distant selections were often based primarily on the economic value of the land rather than on any traditional link to the land itself.³⁰

As to all lands selected by the village corporations, ANCSA required that the corporations "convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as of December 18, 1971 ... as a primary place of residence, or

²⁵ 43 U.S.C. § 1613(a).

²⁶ 43 U.S.C. § 1613(b).

²⁷ 43 U.S.C. § 1611(a)(1).

²⁸ 43 U.S.C. § 1613(g).

²⁹ See e.g., Arnold, *supra*, at 243, 247 (noting village corporation selections in one instance over 300 miles from the village and in another approximately 50 miles distant).

³⁰ E.g., *id.* at 246.

as a primary place of business, or as a subsistence campsite, or as headquarters for reindeer husbandry."³¹ The corporations were also required to convey to any "Municipal Corporation in the Native village or to the State in trust for any Municipal Corporation established in the Native village in the future, title to the remaining surface estate of the improved land on which the Native Village is located"³²

Koniag's history offers an excellent example of the way in which ANCSA's disbursement scheme resulted in a complex pattern of ownership of ANCSA land. Because a large portion of the lands within Koniag's regional boundaries included a previously established national wildlife refuge and because Koniag's deficiency lands were distant and difficult to reach by the residents within the region, Koniag and certain of the village corporations (the "deficiency village corporations") within the region were unable to select acceptable lands sufficient to satisfy the amounts allotted to them by ANCSA.³³ In order to resolve this and other issues facing the Koniag region, Koniag sought a legislative solution.³⁴ In a part of the Alaska National Interests Lands Conservation Act (ANILCA),³⁵ Congress allowed Koniag and the deficiency village corporations within the region to exchange selection rights to distant land along the Alaska Peninsula for more proximate land previously designated as part of the Chugach National Forest.³⁶ That land,

³¹ 43 U.S.C. § 1613(c)(1).

³² 43 U.S.C. § 1613(c)(3).

³³ Alaska National Interest Lands Conservation Act of 1979: Hearings on H.R. 39 Before the House Comm. on Interior and Insular Affairs, 96th Cong., 1st Sess. 1215 (1979) (statement of Edward Weinberg, counsel for Koniag).

³⁴ *Id.* at 1218.

³⁵ Pub. L. No. 96-487, 94 Stat. 2371 (1980) § 1427.

however, was not provided to Koniag and the village corporations in the manner previously determined by ANCSA. Rather, ANILCA required that Koniag and the deficiency village corporations enter into a joint venture which would receive and manage the surface estate of the land.³⁷ The subsurface rights to the land were conveyed solely to Koniag.³⁸

During the first decade after ANCSA's passage, certain of the village corporations within the Koniag region merged with Koniag. Following litigation challenging the effect of the merger,³⁹ only two of the village corporations remain merged with Koniag. Koniag is now the owner of the surface rights to the lands originally selected by those two village corporations as well as the subsurface rights to the village selections which were outside the wildlife refuge. In exchange, the shareholders of those village corporations received additional shares in Koniag. One of those village corporations was the ANCSA village corporation for the Village of Karluk.

Prior to ANCSA's passage, Karluk resided on a reservation established by Executive Order.⁴⁰ Unlike Venetie, the shareholders of the Karluk Village

³⁶ *Id.* § 1427(b).

³⁷ *Id.* § 1427(c).

³⁸ *Id.* § 1427(b). In another provision of ANILCA affecting the Koniag region, certain village corporations representing villages that had been denied certification under ANCSA were provided with one square mile of land. *Id.* § 1427(e)(3)(A). As under ANCSA, when the surface estate was not within a wildlife refuge, the subsurface estate to that land was conveyed to Koniag.

³⁹ See *Leisnoi, Inc. v. Stratman*, 835 P.2d 1202 (Alaska 1992).

⁴⁰ Arnold, *supra*, at 86-87; David S. Case, *Alaska Natives and American Laws* 103-07 (1984); see also *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949).

Corporation opted not to acquire title to the surface and subsurface of its former reserve.⁴¹ Instead, they opted to receive the normal benefits of the Act including enrollment in both village and regional corporations.⁴² Because Karluk merged and remains merged with Koniag,⁴³ each former Karluk corporation shareholder now holds additional shares of Koniag stock and Koniag owns the lands originally patented to the Karluk Village Corporation. In direct contrast to Venetie, the lands surrounding the community of Karluk, including much of the former reservation, are now owned in fee simple by the regional corporation and not by the village corporation for the Village of Karluk.⁴⁴

SUMMARY OF ARGUMENT

Koniag supports the Ninth Circuit's determination that the former reservation land now held in fee by the Village of Venetie satisfies the definition of Indian Country. Koniag, however, is concerned that much of the Ninth Circuit's reasoning, especially when applied to lands held by regional corporations, is contrary to the language and intent of ANCSA. In short, Koniag believes that the Ninth Circuit failed to recognize the full effect of Congress' resort to the corporate form in settling Alaska Native claims. Ignoring the enormous diversity among regional corporation shareholders, the Ninth Circuit erroneously reduced all Alaska Native shareholders to a

⁴¹ Arnold, *supra*, at 199.

⁴² 43 U.S.C. § 1618.

⁴³ 43 U.S.C. § 1627 (permitting, under certain circumstances, merger of village corporations with regional corporations).

⁴⁴ Implicit in the Karluk Village Corporation shareholder's decision to merge their village corporation with the regional corporation is the agreement by the village shareholders to cede management of their corporation's land interests to the regional corporation in which the village shareholders are a minority.

single interest. Pursuing this reasoning to its logical end, the Ninth Circuit determined that, regardless of its continued ownership by a regional corporation, all ANCSA land was amenable to the designation of Indian Country. This conclusion wrenches control of the land away from corporations that must represent the interests of all of their shareholders and places it in the sole hands of village governments who owe no similar obligation.

As an Alaska Native corporation, Koniag appreciates the critical importance of sovereignty and autonomy for Native Villages. Moreover, Koniag strongly believes that Indian Country does exist in Alaska. At the same time, Koniag asserts that Indian Country, when applied to land still held in whole or in part by a regional corporation, is incompatible with Congress' intent to bestow the benefits of settlement on all Alaska Natives.

ANCSA created a complex layering of Native interests, no one of which was to be unduly favored to the disadvantage of others. The reasoning of the Ninth Circuit, including much that is not necessary to its conclusion, upsets this delicate balance. By granting authority over corporate owned land to village governments, the Ninth Circuit pits non-resident shareholders against resident shareholders. This outcome not only contradicts Congress' explicit intent, but it threatens a "blizzard of litigation" amongst Alaska Natives. A just resolution of this dispute will restore to all ANCSA shareholders the benefit Congress provided them under ANCSA and allow them to choose the governance of their lands.

I. ALTHOUGH OVERLAPPING, THE INTERESTS OF ALASKA NATIVE SHAREHOLDERS AND VILLAGE MEMBERS ARE NOT SYNONYMOUS

A. Alaska Native Villages and Alaska Native corporations do not share a unity of persons.

As the statutory structure makes clear, ANCSA created a necessary distinction between shareholders and village residents. This distinction insured that all Native Alaskans would receive the benefits of the Act regardless of their place of actual physical residence. The Ninth Circuit overlooked this distinction.

Examples of Congress' intent to separate receipt of benefit from place of residence abound, but are perhaps most obvious in the nature of the regional corporations themselves. Congress provided that an Alaska Native could be enrolled to a regional corporation if he or she had been born in the region or an ancestor had come from the region.⁴⁵ Accordingly, the land distributed under ANCSA was not distributed to corporations owned by Alaska Native Villages per se or even to Alaska Native Villagers, but to corporations owned by all Alaska Natives. This is not to say that villages were somehow excluded from the benefits of ANCSA. Alaska Native Villages did then and continue now to play crucial roles in the lives and culture of Alaska Natives. Nevertheless, it was the corporations, the shareholders of which included both village resident and non-resident shareholders, that were the actual recipients of ANCSA lands.

In crafting this structure, Congress conveyed its intent to avoid the creation of distinctions or privileged categories of Alaska Native shareholders. In other words, the non-resident Alaska Native shareholder was placed on an equal footing with the resident shareholder in the

⁴⁵ 43 U.S.C. § 1604.

receipt of ANCSA benefits. The Ninth Circuit's opinion, however, by giving village governments the power to regulate ANCSA lands upsets this balance and creates the potential for village residents to disenfranchise non-resident shareholders.

Two of the principal powers of a sovereign tribe are the power to exclude non-members,⁴⁶ and the power to tax.⁴⁷ These powers, if applied to ANCSA land by Alaska Native Village governments might literally divert all benefit of that land from non-resident shareholders in favor of village residents.

A simple example illustrates this point. The principle benefit to Koniag of fee ownership of the subsurface estate to ANCSA land is the ability to profit from subsurface resources. Yet, if Koniag sought to obtain the benefit of those resources through the sale or lease of its subsurface rights, a village claiming rights to the land as a tribal sovereign could literally prevent such a transaction either by placing a prohibitive tax on the enterprise or by excluding all but village members from the land.⁴⁸ By exercising this power, village governments would be given virtual veto power over regional corporations ability to profit from their land. Thus, a

⁴⁶Felix S. Cohen, *Handbook of Federal Indian Law* 252 (1982 ed.).

⁴⁷*Washington v. Confederated Colville Tribes*, 447 U.S. 134 (1980).

⁴⁸The relative interests the village corporation owning the surface and the regional corporation owning the subsurface has been largely established. See *Koniag, Inc. v. Koncor Forest Resources*, 39 F.3d 991 (9th Cir. 1994) (holding that where no other practical source exists, village corporation may use subsurface resources, but must pay regional corporation reasonable price for such use); *Tyonek Native Corp. v. Cook Inlet Region*, 853 F.2d 727 (9th Cir. 1988) (holding that village corporations have no right to extract rock, sand and gravel from subsurface estate for commercial sale).

minority of resident shareholders could unilaterally foreclose non-resident shareholders from the benefits Congress provided them under ANCSA.⁴⁹

Although the above example is simple, as additional competing interests are added, its ramifications become mind-bogglingly complex. To this point, we have focused primarily on the resident and non-resident categories of regional shareholders. Yet, even this model oversimplifies the nature of regional corporations. In fact, regional corporations include shareholders of far greater diversity. For example, assuming a shareholder resides in a village, he or she may reside in any one of several villages within the region's boundaries. Thus, the assertion of authority over regional corporation land by one village would divest every other village and village resident of the benefit of their interest in that land. Even more complicated, the regional corporations are required to place 70% of the revenues generated from timber and subsurface resources in a pool divided among the twelve regional corporations based on the number of shareholders originally enrolled to each region.⁵⁰ Fifty percent of the funds received are further distributed by the receiving regional corporations to their village corporations and "at large shareholders." The other 50% is retained by regional corporations to benefit all shareholders.⁵¹ Clearly then, the regional corporations benefit all shareholders in all the regions. Thus, by permitting individual village governments to

⁴⁹ The Ninth Circuit emphasized that under ANCSA "voting rights may be limited to Native stockholders." *State of Alaska v. Native Village of Venetie*, 101 F.3d 1286, 1296 (9th Cir. 1996). This, however, does not bolster the Ninth Circuit's broad application of Indian Country to ANCSA land. As demonstrated, Native stockholders do not equate to village residents.

⁵⁰ 43 U.S.C. § 1606(i). Price II, *supra*, at 251-52.

⁵¹ 43 U.S.C. § 1606(j).

determine the extent to which regional corporations can utilize and manage their land, the Ninth Circuit threatens to put village at odds with village, village resident with non-resident, and even region with region.

The Ninth Circuit's reliance on ANCSA Section 1602(j) is indicative of its truncated view of the statute. Section 1602(j) defines village corporations as a "business for profit or nonprofit, corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of a Native Village" The Ninth Circuit determined that this provision demonstrated that ANCSA did, in fact, set aside land for Alaska Natives.⁵² Nevertheless, even if the Ninth Circuit were correct that village corporations are synonymous with village governments (a questionable claim, but one better addressed by *Amicus* Shee Atika), it nevertheless has ignored the role regional corporations play in the distribution of ANCSA land. As explained above, except in the unusual case in which a village corporation selected a former reservation under ANCSA Section 1618(b) (as did the Appellees in this case), or where a village corporation is within a prior existing wildlife refuge, regional corporations are the owners of the subsurface rights to lands selected by a village corporation. Consequently, all shareholders of the regional corporation have equal claim to the benefit of the subsurface of that land.⁵³

Equally problematic is the Ninth Circuit's frequent resort to the principle that ANCSA "should be liberally construed, and doubtful expressions should be

⁵² *Venetie*, 101 F.3d at 1295.

⁵³ This claim is merely bolstered by the fact that in some circumstances, as is the case with Koniag, village corporations have merged with their regional corporation. In such cases, the regional corporation becomes the owner of both the surface and subsurface estate where appropriate.

resolved in favor of the Indians."⁵⁴ The Alaska Native shareholders are far from the unitary stereotype apparently embraced by the Ninth Circuit. They are diverse, some living in remote villages, some in towns and small cities, and some in major metropolitan areas both within and outside of Alaska. Many have no relationship to any village. The Alaska Native shareholders of Koniag are in turn diverse from the shareholders of the remaining regions. Alaska Native shareholders and Alaska Native people simply do not fit a mold.

Ignoring the broad diversity among Alaska Natives, the Ninth Circuit reflexively equated Alaska Native interests with the interests of residents of Alaska Native Villages. This telescoping of Alaska Native interests into village government interests skews the true purpose of ANCSA -- benefiting all Alaska Native shareholders. The problem then, is not the court's recognition of the tremendous importance of Alaska Native Villages to a great many Alaska Natives, but the court's elevation of village governments to the exclusion of all other Alaska Native interests.

B. Alaska Native Villages and Alaska Native corporations do not share a unity of purpose.

Regional corporations are not solely motivated by profit.⁵⁵ As Alaska Native corporations, they must serve a diverse array of Alaska Native interests. Unquestionably, one of those interests is protecting land that has important social and cultural significance to the shareholders of the corporation.⁵⁶ The board of directors, the body charged with striking this balance, is elected by

⁵⁴ *Venetie*, 101 F.3d at 1293-94 (internal quotations omitted).

⁵⁵ *Arnold*, *supra*, at 284.

⁵⁶ *Id.*

all the shareholders.⁵⁷ Because villages are now and will continue to be an important repository of Alaska Native values and culture, the elected corporate boards of regional corporations will continue to pursue policies that ensure the preservation and advancement of Native Villages. But like any broadly elected body, boards must be able to balance the interests of all of their constituents and to alter their policies as the needs of those constituents change. This combination of flexibility and conservation answers ANCSA's call to satisfy the "real economic and social needs of natives,"⁵⁸ including the desire "to preserve for Indians ... the mobility which exists in American Society today."⁵⁹

Although unique in the broad range of activities they may undertake on behalf of their shareholders, regional corporations are nonetheless governed by the same laws as any other Alaska corporation.⁶⁰ With a few exceptions, Alaska Native shareholders in ANCSA corporations possess "all rights of a shareholder in a business corporation organized under the laws of the State."⁶¹ By mandating this corporate structure, ANCSA insured that regional corporations would be precluded from distributing corporate assets to one category of shareholders only.⁶²

⁵⁷ 43 U.S.C. § 1606(h).

⁵⁸ 43 U.S.C. § 1601(b).

⁵⁹ Alaska Native Land Claims: Hearing on H.R. 11213, H.R. 15049, and H.R. 17129 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 90th Cong., 2d Sess. 90 (1968).

⁶⁰ 43 U.S.C. §§ 1606(d), 1607(a).

⁶¹ 43 U.S.C. § 1606(h)(1)(A)(iii).

⁶² See *Hanson v. Kake Tribal Corp.*, 939 P.2d 1320, 1324 (Alaska 1997) ("One of the rights of a shareholder of a business corporation [including ANCSA corporations] is the

In addition to the implicit protections corporate law provides to ANCSA shareholders, Congress also included in ANCSA explicit protections against inequities among ANCSA Alaska Native shareholders. In Section 1606(e) of the Act, Congress required each regional corporation to submit its articles of incorporation to the Secretary of the Interior for approval. The sole purpose of this provision was to give the Secretary the opportunity to "withhold approval [of the articles] if in his judgment inequities among Native individuals or groups of Native individuals would be created."⁶³

In contrast to the diverse constituency served by regional corporations, village governments serve a far narrower constituency. Where regional corporations must balance the interests of all of their shareholders, village governmental bodies must serve the interests of their village members.⁶⁴

right to enjoy equal rights, preferences, and privileges on his or her shares."); see also, Branson, *supra*, at 109-10. Only recently have ANCSA corporations been empowered to create special programs favoring particular groups of shareholders such as the elderly. See 43 U.S.C. § 1606(g)(2)(B)(iii)(I). Notably, Congress specifically precluded ANCSA corporations from providing these special programs to shareholders based on their place of residence. 43 U.S.C. § 1606(g)(2)(B)(iii)(II), (IV). In addition, such programs require votes of all shareholders, *Broad v. Sealaska Corp.*, 85 F.3d 422 (9th Cir. 1996), *cert. denied*, __U.S.__, 117 S.Ct. 768 (1997), as do settlement trusts formed to promote the "health, education and welfare of its beneficiaries." 43 U.S.C. § 1629e(b)(1).

⁶³ 43 U.S.C. § 1606(e).

⁶⁴ See e.g., Br. of Amicus Shree Atika, Appendix B at 13a (preamble to IRA Constitution providing that purpose of constitution is to advance interests of tribe); see also, 25 U.S.C. §§ 473a, 476 (allowing Alaska Natives having a common bond of occupation, or association or residence within a well-defined geographic area to organize for their common welfare).

Additionally, like any shareholders, ANCSA shareholders owe a duty not to overreach.⁶⁵ In the context of corporate law, overreaching includes reaping a benefit to the exclusion or detriment of minority share interests.⁶⁶ There is no similar restriction on village governments or their members. As sovereigns, village governments have powers and limitations similar to the federal government. Among other things, villages may legislate, administer justice, and exclude persons from their territory.⁶⁷ Although the Indian Civil Rights Act, 25 U.S.C. § 1301 *et al.*, prevents villages from violating individual constitutional rights, those limitations are no greater than the limitations traditionally imposed on the federal government. In other words, short of infringing a fundamental constitutional right, tribes are automatically free to legislate in favor of one particular group to the exclusion of others.⁶⁸ Corporations, by contrast, are not granted such broad authority, and must adhere to the strict principle that all shareholders, of like class, be treated alike.

Into this mix of corporate and village authority the Ninth Circuit has imposed Indian Country. In so doing, the Ninth Circuit has done by judicial fiat what ANCSA corporations are precluded from doing. It has given the right to manage corporate assets to a category of shareholders (village residents) who have no legal obligation to represent the interests of their fellow shareholders.

⁶⁵ Branson, *supra*, at 124

⁶⁶ *Id.*

⁶⁷ Cohen, *supra*, at 248-52.

⁶⁸ In enacting legislation favoring or benefiting any particular class of persons, tribes are generally limited to the same extent as the federal government. See 25 U.S.C. § 1301 *et al.* (applying protections contained in the Bill of Rights to Indian tribes).

Despite this dramatic result, the Ninth Circuit's dicta that land still held by ANCSA corporations may be designated as Indian Country was entirely unnecessary to its resolution of the dispute before it. In Venetie's case, once the village corporations had deeded the former reservation to the village of Venetie the corporations dissolved.⁶⁹ This dissolution not only removed all corporate interests and responsibilities, but it left a complete unity between village member and land owner. That unity does not exist except in the rare case, as in Venetie, where the shareholders and the village residents are not only the same but where the shareholders have elected to deed back to the village its former reservation. Permitting Venetie to exercise its authority over its former reservation (as the Ninth Circuit correctly did) in no way required a determination that all ANCSA lands are subject to Indian Country status.

Similarly, the Ninth Circuit's focus on the fee ownership of ANCSA lands and its reliance on *United States v. Sandoval*⁷⁰ and *United States v. Chavez*,⁷¹ ignored the real issue before it. Properly posed, the question is not whether land owned in fee can be Indian Country,⁷² but whether land owned by a corporation with both resident and non-resident shareholders can constitute Indian Country under the sole control of the residents of a single village. Congress' resort to the corporate form demonstrates its intent to insure shareholders received the democratic protections underlying corporate law. Unless these protections are to become superfluous the answer to the above question must be in the negative.

⁶⁹ *Venetie*, 101 F.3d at 1289-90.

⁷⁰ 231 U.S. 28 (1913).

⁷¹ 290 U.S. 357 (1933).

⁷² *Venetie*, 101 F.3d at 1296.

ANCSA's resort to a hybrid corporate form assured the protection of Alaska Native culture without forcing individual Alaska Natives to conform to any particular notion of what Alaska Native life should be.⁷³ The Ninth Circuit's facile equation of ANCSA corporations with Alaska Native Villages sweeps away much of this promise. Instead, the Ninth Circuit's opinion imposes on Alaska Native shareholders its implicit assumption that all Alaska Native shareholders are also villagers. Because this assumption is empirically incorrect and because it violates the letter and spirit of ANCSA, the Ninth Circuit's opinion should be modified to limit its holding to the facts before it.

II. THE NINTH CIRCUIT'S OPINION WILL GENERATE WIDESPREAD AND PROTRACTED LITIGATION AS ALASKA NATIVE VILLAGES AND REGIONAL CORPORATIONS SEEK TO DETERMINE THEIR AUTHORITY OVER ANCSA LAND.

As a regional corporation Koniag is greatly concerned with the real world result of the Ninth Circuit's opinion. Koniag fears that the indeterminacy of the standard applied by the Ninth Circuit to ANCSA land will result in widespread and protracted litigation as various Alaska Native groups seek to determine the extent of their authority over ANCSA land. This outcome is particularly disconcerting to a regional corporation such as Koniag whose region encompasses 15 separate villages.⁷⁴

⁷³ For example, except in limited circumstances, ANCSA prohibits alienation of ANCSA corporate shares. 43 U.S.C. § 1606(h)(1)(B). ANCSA also limits voting rights to Alaska Native shareholders. 43 U.S.C. § 1606(h)(2)(C). These provisions insure that for the indefinite future ANCSA corporations will be responsive to the specific demands of Alaska Native constituents.

Koniag believes that any village may be sovereign and any village and regional corporation may transfer their respective interests in the lands or a portion of them to that sovereign in accordance with standard corporate practices. To hold otherwise, would defeat the very diversity regional shareholders exhibit. Equally, to impose Indian Country on land owned by shareholders who do not choose such a designation or who are precluded from protesting it because they are not residents, defeats this diversity and marginalizes the self-determination guaranteed each Alaska Native under ANCSA.

Consequently, Koniag believes that in cases in which ANCSA corporations maintain whole or partial ownership of land, and have not consented to the assertion of sovereignty over that land, such an assertion is precluded. Under this bright line rule, application of the Ninth Circuit's six part test to ANCSA land would be unnecessary except in cases such as Venetie.

Because of Venetie's unique circumstance, the Ninth Circuit's opinion does not address the necessary consequences of applying its reasoning to the vast majority of ANCSA land. Indeed, because of the complexity of the legal relationships created by ANCSA, it would take a book to plumb the intricacies of the litigation that might result from the Ninth Circuit's reasoning. Koniag does not attempt a book here. Rather, Koniag wishes to provide the Court with just a

⁷⁴ Seven of the villages also contain village corporations although there are only five village corporations as a result of village corporation consolidations. There is one urban corporation (similar to the status of *Amicus Shee Atika*). Two villages have no village corporation because the village corporations merged with Koniag. There are five village corporations in five villages given limited entitlements under ANILCA. Pub. L. No. 96-487, 94 Stat. 2371 (1980) § 1427(e)(3)(A).

brief glimpse of the Pandora's box the Ninth Circuit's opinion is likely to open.

A village's assertion of sovereignty over particular land requires the resolution of three separate issues. First, a court must determine whether the village is a sovereign.⁷⁵ Second, the court must determine whether the land over which the village has asserted authority is Indian Country. Third, the court must determine if the action by the village is within its proper authority.⁷⁶ None of these issues are easily resolved.

At no point in its opinion does the Ninth Circuit address the question of how much ownership is necessary before a sovereign entity can declare Indian Country status over a particular piece of land. Even if the Ninth Circuit were correct that Native Villages and village corporations were synonymous, the court failed to account for the fact that village corporations own at most only the surface estate to land.

This problem is only compounded in situations, as with Koniag, in which village corporations have merged with regional corporations. Or, in another example from Koniag's experience, where village corporations and regional corporations have received ANCSA land as a joint venture.⁷⁷ Although this latter case may seem obvious even under the Ninth Circuit's formulation, a close look and a clever advocate could make it far more

⁷⁵ The question of tribal sovereignty is one traditionally left to the Congressional and Executive branches. Arnold, *supra*, at 3-4. The Department of Interior has accepted the general principle that Native Alaskan villages can constitute separate sovereigns.

⁷⁶ See *Montana v. United States*, 450 U.S. 544, 564 (1981). (holding that tribal sovereign power does not reach beyond what is necessary to protect tribal self-government or to control internal relations).

⁷⁷ ANILCA, Pub. L. No. 96-487, 94 Stat. 2371 (1980) § 1427.

ambiguous. For example, one of the principle reasons for the joint venture's receipt of the land was that the land had "traditionally played a special role in the history and culture of the Koniag people."⁷⁸ Under the reasoning of the Ninth Circuit, there is no inherent bar to one or several of the participating villages from asserting that the land played a particularly important role in their village history and, therefore, the land should be within their sovereign power. In this way, one village might bypass not only the rights of the regional corporation and its shareholders but also the rights of its fellow villages.

The Ninth Circuit's opinion also fails to account for circumstances in which ANCSA land has been sold or conveyed under Section 1613(c)(1) to a non-Native. Neither regional nor village corporations are statutorily barred from selling their interests in ANCSA lands.⁷⁹ But the Ninth Circuit's reasoning fails to explain whether or not Indian Country would continue to apply to ANCSA land despite its sale. Even more troubling are those situations in which corporations have already sold portions of their ANCSA selections. Would villages be permitted to effectively nullify those sales by asserting sovereign authority over the land? These issues become all the more baffling when the land in question is neither within or near the village, but distant land selected principally for its economic value.⁸⁰

Of course, before a court could even attempt to resolve whether ANCSA land constitutes Indian Country,

⁷⁸ Alaska National Interest Lands Conservation Act of 1979: Hearings on H.R. 39 Before the House Comm. on Interior and Insular Affairs, 96th Cong., 1st Sess. 1219 (1979) (statement of Edward Weinberg, counsel for Koniag).

⁷⁹ See Price I, *supra*, at 61 (pointing out that a village corporation could sell its surface estate and invest in assets in Hawaii or Indonesia).

⁸⁰ E.g., Arnold, *supra*, at 246.

it would be first required to determine whether a particular village is a tribal sovereign. The procedural history of this case illustrates the difficulty courts will have in resolving this issue alone. Before arriving in the Supreme Court, this case was remanded by the Ninth Circuit to the district court on the sole issue of whether or not Venetie was a tribe.⁸¹ As the Ninth Circuit explained in its first remand to the district court, if a village's status cannot be determined by reference to the Indian Reorganization Act,⁸² then "tribal status may still be based on conclusions drawn from careful scrutiny of various historical factors."⁸³ A less determinate test can barely be imagined.

As this discussion demonstrates, every village and every parcel of land presents a unique set of facts, each one requiring separate analysis by a court. With no real standards by which to judge, however, courts will be forced to engage in a determination more metaphysical than legal or factual.

Contributing to the uncertainty created by the Ninth Circuit's opinion is the well-settled principle that when the assertion of jurisdiction by a state or federal court would interfere with tribal sovereignty those court's must defer to the tribal court.⁸⁴ Although Koniag fully supports and encourages the development of tribal court's, Koniag is concerned with the conflicting standards that would likely result from a multiplicity of separate tribal courts resolving disputes over the Indian Country status of ANCSA land. Such a result would make it all the more difficult for regional corporations, as

⁸¹ *Venetie*, 101 F.3d at 1303 n.7.

⁸² 25 U.S.C. §§ 473a, 476.

⁸³ *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1387 (9th Cir. 1988) (*Venetie I*).

⁸⁴ *E.g.*, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

well as the people and entities with whom they do business, to predict the outcome of any particular case.

In addition, the Ninth Circuit's formulation places the boards of regional corporations like Koniag in a particularly tenuous position. Regional corporations owe a fiduciary duty to all of their shareholders. Thus, if a village asserted its authority over land wholly or partially owned by a regional corporation, the corporation may have an obligation to challenge that assertion in order to protect the interests of its non-resident shareholders. Failure to carry out that obligation might leave corporation boards exposed to claims of breach of duty.⁸⁵

CONCLUSION

For these reasons *Amicus* Koniag urges that the judgment of the Court of Appeals be affirmed, but that the reasons for such affirmance be limited to the specific facts concerning appellee Venetie.

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⁸⁵ *See* Branson, *supra*, at 120-21 (noting that regional directors must walk a tightrope between favoring a particular village or cultural group and using ANCSA power unreasonably to favor regional interests).